THE CONTOURS OF COMMAND RESPONSIBILITY: PHILIPPINE INCORPORATION AND CUSTOMARY EVOLUTION

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> *Ultimately, as individuals we are all helpless before the state, the collective power of armies and governments, the voices that order us to halt in the street. Or command that we push the buzzer and let them up the stairs. When the group that has come to get us is at the door, it is late to begin considering the possibilities of organized opposition. But the knowledge of torture is itself a political act, just as silence or ignorance of it has political consequence. To speak of the unspeakable is the beginning of action.*
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> —Kate Millet[1]

In the wake of the ongoing "extrajudicial killings" of journalists, political dissidents, and other civilians dubbed by several military leaders as "enemies of the State,"[2] the Philippine Supreme

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[1] KATE MILLET, THE POLITICS OF CRUELTY: AN ESSAY ON THE LITERATURE OF POLITICAL IMPRISONMENT 296 (1995 ed.).

[2] MELO COMMISSION REPORT 16, 19–29 (2007). This piece was originally written in the latter part of 2006; however, as it turned out, developments in the

Court issued Administrative Order 25-2007,[3] designating special courts to hear, try, and decide cases involving killings of political activists and members of media. Soon afterwards, Chief Justice Reynato Puno declared that the Supreme Court will hold a multi-sectoral summit on extrajudicial killings and set the stage for the possible rewriting of Philippine legal procedures in order to facilitate and expedite the prosecution of the perpetrators.[4]

The Supreme Court's initiatives are the first concrete proposals to revise the current legal framework in order to address the problem of extrajudicial killings in the Philippines. While the Chief Executive had constituted the Melo Commission to conduct fact-finding investigations (and the Commission's Report has already been made public), the Chairman of the Commission himself declared that the Commission's Report was "complete, but not final," in view of the continuation of extrajudicial killings.[5] Significantly, the Melo Commission Report itself recommends the drafting of a special law for "strict chain-of-command responsibility:"

> The President should propose legislation to require police and military forces and other government officials to maintain strict chain-of-command responsibility with respect to extrajudicial killings and other offenses committed by personnel under their command, control, or authority. Such legislation must deal specifically with

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political scene in the Philippines necessitated the inclusion in this paper of matters beyond the yearbook's annual coverage, as in the case of the report cited here. Nevertheless it was decided that the essay should still appear in the 2006 edition of the APYIHL as was originally intended by the author [eds.]

[3] (Re: Designation of Special Courts to Hear, Try and Decide Cases Involving Killings of Political Activists and Members of Media), 1 March 2007; *See* Jay Rempillo, *SC Designates Special Courts for Extrajudicial Killings*, 2 March 2007, available at: <http://www.supremecourt.gov.ph/news/courtnews%20flash/2007/03/03020703.php> (Last visited 2 June 2007).

[4] Volt Contreras, *SC to Hold Summit On Extrajudicial Killings*, 23 June 2007, available at: <http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=72925> (Last visited 26 June 2007).

[5] Thea Alberto, *Melo: Commission Report 'Complete' But Not 'Final' Because of Continued Slays*, 15 February 2007, available at: <http://newsinfo.inquirer. net/breakingnews/nation/view_article.php?article_id=49657> (Last visited 25 June 2007).

> extralegal, arbitrary, and summary executions and forced 'disappearances' and provide appropriate penalties which take into account the gravity of the offense. It should penalize a superior government official, military, or otherwise, who encourages, incites, tolerates, or ignores, any extrajudicial killing committed by a subordinate. The failure of such a government official to prevent an extrajudicial killing, if he had a reasonable opportunity to do so, or his failure to investigate and punish his subordinate, or to otherwise take appropriate action to deter or prevent its commission or punish his erring subordinate would be criminalized. Even "general information"—e.g. media reports—which would place the superior on notice of possible unlawful acts by his subordinate should be sufficient to hold him criminally liable if he failed to investigate and punish his subordinate.[6]

The foregoing judicial and legislative responses to the problem of extrajudicial killings in the Philippines make it imperative to revisit the doctrine of command responsibility under international law, and particularly as incorporated into Philippine law. Owing to the lack of clarity on the precise content and elements of the doctrine of command responsibility in Philippine jurisdiction, there has been some reluctance to fully exhaust this doctrine as a species of attribution for criminal prosecution in the Philippines. This should not be the case. The doctrine of command responsibility is the articulation of a global consensus that the architects of the most egregious wartime atrocities, crimes against humanity, grave breaches of the Geneva Conventions, and serious violations of human rights should not escape criminal legal sanction and responsibility. As will be subsequently shown, considering the marked provenance of the doctrine of command responsibility (traceable to the Philippines, among other jurisdictions), there is a greater impetus for the doctrine to be fully utilized in the Philippine legal system.

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[6] MELO COMMISSION, *supra* note 3, at 71.

Part I of this paper traces the historical contours of the doctrine of command responsibility, its status as customary international law, and its incorporation into Philippine law, as affirmed and articulated in post-World War II cases decided by the Philippine Supreme Court.

Part II then examines the doctrinal nuances of command responsibility as a form of derivative imputed criminal liability upon superiors, scrutinizes the requirements of *mens rea* and *actus reus* to satisfy legal attribution, and addresses the extent of the applicability of the defense of "superior orders."

Part III discusses emerging refinements to the doctrine of command responsibility from the recent rules and jurisprudence of international criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC).

Part IV analyzes the applicability and limitations of the command responsibility doctrine to the extrajudicial killings, considering its present customary international law status and the extent of its incorporation into Philippine law.

The paper draws several conclusions. First, the international law doctrine of command responsibility is already incorporated into Philippine law. Second, the elements of the doctrine as incorporated into Philippine law are still those defined in World War II jurisprudence, namely, (1) command authority and responsibility between the superior and the subordinate; (2) the existence of information triggering an affirmative duty on the part of the commander; (3) the superior's omissions, failure of supervision, or foreseeable negligence and their causal nexus with the subordinate's crime; and (4) the imputation to the superior of the same criminal liability and punishment for which the subordinate is liable. Third, while there is no legal hindrance to utilizing the doctrine of command responsibility (as presently incorporated into Philippine law) as basis to prosecute erring superiors for extrajudicial killings in the Philippines, special legislation may have to be passed to take into account the recent international legal refinements to the doctrine of command responsibility, particularly on the *mens rea, actus reus,* and the penalty prescribed. Finally, the paper concludes that the deliberate refusal to use the doctrine of

command responsibility in Philippine jurisdiction amounts to a denial of justice under international law, and a potential breach of a state's duty, under the principle of *aut dedere aut judicare,* to prosecute and punish those who commit violations of the laws of war and crimes against humanity.

Historical Contours of Command Responsibility and Incorporation into the Philippine Legal System

The concept of holding a superior or commander liable for the conduct and acts of his subordinates can be documented as far back as the fifteenth century, when Charles VII of France issued the 1439 Ordinance of Orleans, decreeing that captains or lieutenants be held "responsible for the abuses, ills, and offenses committed by members of his company," and that "as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice." If these officials failed to do so, covered up the misdeed, or were delayed in taking action, or if due to their negligence the offender escapes or evades punishment, they are "deemed responsible for the offense as if he had committed it himself and punished in the same way as the offender would have been." A similar formulation of the doctrine was widely used in other military codes and articles of war throughout Europe.[7] In 1863, the United States government enacted General Order No. 100, otherwise known as the Lieber Code,[8] which permitted superiors to immediately punish

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[7] Victor Hansen, *What's Good for the Goose is Good for the Gander Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Toward Its Own*, 42 GONZ. L. REV. 335, 350–352 (2007); *See* Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L. L. 555–559 (2006).

[8] The Lieber Code has been credited with containing many of the current norms of the laws of war and international humanitarian law. *See* MARCO SASSOLI AND ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW, 101 (1999 ed.); GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE, 171–172 (2000 ed.).

subordinates with death (or such other severe punishment adequate for the gravity of the offense) for committing "wanton violence against persons in the invaded country," "destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants." Superiors could be punished with death if they "order or encourage" subordinates to intentionally inflict "additional wounds on [an] enemy already wholly disabled."[9]

The 1907 Hague Conventions, already deemed to have the status of customary international law,[10] expressly provides for the doctrine of command responsibility in the following articles of the Fourth 1907 Hague Convention:[11]

HAGUE CONVENTION (No. IV)

> Art. 1. The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.
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> Art. 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

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[9] United States General Orders No. 100 (otherwise known as the 1863 Lieber Code), Articles 44 and 71, available at: <http://www.civilwarhome.com/liebercode.htm>.

[10] Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 226, para. 75 at 256 (8 July).

[11] Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, 18 October 1907, *entered into force* 26 January 1910, Articles 1 and 3; Annex: Regulations Respecting the Laws and Customs of War on Land, Ch. 1, Article 1.

ANNEX: REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

Chapter 1: The Qualifications of Belligerents

Art. 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army" [emphasis supplied].

The foregoing provisions of the Fourth Hague Convention and its Annex fully recognize the distinct relationship and unique command structure between superiors and subordinates in a military organization, and categorically impose responsibility for all the acts of subordinates in military conflicts.

Following World War I, an international commission was formed which proposed command responsibility for both civilian and military leaders for their failure to prevent or repress violations of the laws of war, when such leaders possessed the power to intervene but did not exercise it. This proposal did not reach codification. It was only in the aftermath of World War II, with the landmark decisions of international military tribunals,[12] that the elements of the doctrine

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[12] *See* M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 228–235 (2nd ed., 1999); Judgement of the International Military Tribunal (IMT) of

of command responsibility were explicitly delineated. Of particular salience to the Philippines is the landmark case of *In Re Yamashita*, where the United States Supreme Court upheld the Philippine Supreme Court's denial of General Tomoyuki Yamashita's petition for habeas corpus, and affirmed the jurisdiction and authority of the military commission before which General Yamashita was charged with numerous violations of the laws of war. *In Re Yamashita* encapsulates the United States Supreme Court's famous articulation of the principle of command responsibility thus:

> It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 28, 46, and 47, Annex to Fourth Hague Convention, 1907, 36 Stat. 2277, 2296, 2303, 2306, and 2307. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such

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Gen. Tomoyuki Yamashita [hereinafter, *Yamashita*]; Nuremburg Judgment, *United States v. Wilhelm von Leeb;* Nuremburg Judgment, *United States v. Wilhelm List*; Judgment, International Military Tribunal for the Far East (Tokyo Trials), full texts available at: <http://www.ess.uwe.ac.uk/genocide/trials.htm>.

measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out." 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles (of the convention), as well as for unforeseen cases." And, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order

and safety, while respecting, unless absolutely prevented, the laws in force in the country."

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, *an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.* This duty of a commanding officer has heretofore been recognized, and its breach penalized, by our own military tribunals. A like principle has been applied so as to impose liability on the United States in international arbitrations. (*Case of Jenaud,* 3 Moore, International Arbitrations, 3000; *Case of 'The Zafiro,'* 5 Hackworth, Digest of International Law, 707).

Failure of an officer to take measures to prevent murder of an inhabitant of an occupied country committed in his presence. Gen. Orders No. 221, Hq. Div. of the Philippines, August 17, 1901. And in General Orders No. 264, Hq. Div. of the Philippines, September 9, 1901, it was held that an officer could not be found guilty for failure to prevent a murder unless it appeared that the accused had "the power to prevent" it[13] [emphasis and italics supplied].

The common discernible elements of command responsibility from decisions of the World War II international military tribunals are:

1. *Relationship:* the existence of *lines of command authority and responsibility* between the superior and subordinate. These lines are less important, however, in situations of occupation since the commanding authority's

[13] 327 U.S. 1 (1946).

responsibility is broad and general, and not simply limited to the control of units directly supervised by the commanding authority. Occupying authorities are charged with maintaining peace and order, punishing crime, and protecting the lives and property of inhabitants in the occupied territory.[14]

2. *Mens rea:* the existence of *information* that triggers an *affirmative duty* on the part of the superior to act, and/or seek out further information. In *Yamashita,* the United States Supreme Court explicitly recognized that the laws of war impose an affirmative duty on commanders to control their forces, based on Articles 1 and 43 of the Annex to the Fourth Hague Convention of 1907.[15] In *United States v. Wilhelm von Leeb,*[16] (otherwise known as the "High Command Case"), the international tribunal required that the superior must have had either *actual* knowledge of the offenses committed by his subordinates, *and* either acquiesced, participated, or criminally neglected to interfere in order to prevent the commission of such offenses. The Nuremberg trial of *United States v. William List,*[17] (the "Hostage Case") noted that a commander's failure to acquaint himself with the contents of reports on offenses by subordinates, and his failure to require additional reports to investigate the incidents, was a dereliction of

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[14] *See* Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, 2004 ICJ (9 July).

[15] *Id.*, at note 15.

[16] *United States v. Wilhelm von Leeb,* 12 LRTWC 1 at 59 (1948). Full texts available at: <http://www.ess.uwe.ac.uk/genocide/trials.htm>.

[17] *United States v. Wilhelm List.* Full texts available at: <http://www.ess.uwe.ac.uk/genocide/trials.htm>.

his affirmative duty as a superior. Finally, the various judgements of the International Military Tribunal for the Far East in the *Tokyo Trials*[18] commonly held that the superior's duty to act to prevent the commission of such crimes and to punish the perpetrators is triggered by: (a) his *actual* knowledge of the commission of such crimes; (b) the superior's *imputed* or *constructive* knowledge of the subordinates' commission of offenses due to the scale and frequency of the offenses or the presence of official reports and reportage; or (c) the superior's *negligence to obtain knowledge* of the commission of such offenses under circumstances such as failure of supervision over subordinate conduct, or the continuous and efficient operation of command oversight.

3. *Actus reus:* the acts or omissions of the superior in relation to his subordinates' offenses. Once the affirmative duty to act has been triggered, the superior has to take immediate and positive steps to control his forces and address his subordinates' offenses. These may include: (a) taking disciplinary and corrective measures or other steps throughout the command structure to prevent the commission of further atrocities; (b) establishing a system that secures proper conduct by subordinates and protection of the civilian population; and (c) causing the immediate prosecution of the subordinates reported to have committed such offenses.[19] Failure to take these measures would establish the superior's personal

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[18] M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 233 (2nd ed., 1999).

[19] BASSIOUNI, *supra* note 14, at 233.

dereliction or neglect, even amounting to acquiescence in some cases.[20] In the words of the international military tribunal in the *High Command* case, there must be "a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence."

4. *Imputed liability:* the superior incurs the same criminal liability as if he personally committed the offenses with his subordinates. The international military tribunals during World War II generally imposed the same punishment (death or imprisonment) on superiors found to be liable under command responsibility for their subordinates' grave breaches of the laws of war, the 1949 Geneva Conventions, the 1907 Hague Conventions, and commission of torture and crimes against humanity. The imposition of the *same* level and degree of punishment was rationalized under the superior's fundamental obligation to control and organize their subordinates in a manner that maximizes the maintenance of discipline and the prevention of egregious offenses against humanity and the laws of nations. (The disproportionality between the punishment imposed for a superior's serious *omissions* and the level of heinousness accompanying the subordinates' actual commissions of the offenses, has expectedly come under severe criticism from criminal law theorists.)[21]

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[20] *See* STEVEN R. RATNER, AND JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY 132–133 (2nd ed., 2001).

[21] Mirjan Damaska, *The Shadow Side of Command Responsibility,* 49 AM. J. COMP. L. 455, 479–480 (2001); Arthur O'Reilly, *Command Responsibility: A Call to Realign Doctrine with Principles,* 20 AM. U. INT'L. L. REV. 88–100 (2004).

Under the foregoing conceptual elements, the doctrine of command responsibility has gained the status of customary international law.[22] It is this formulation of the doctrine of command responsibility, arising from or traceable to the Hague Conventions as seen in the jurisprudence of the World War II international military tribunals, that is deemed incorporated in the Philippine legal system. In its landmark 1949 decision in *Kuroda v. Jalandoni,*[23] the Philippine Supreme Court explicitly declared the Hague Conventions and the Geneva Conventions as part of the generally accepted principles of international law that, by Constitutional fiat, form part of the law of the land:

> Petitioner argues that respondent Military Commission has no jurisdiction to try petitioner for acts committed in violation of the Hague Convention and the Geneva Convention because the Philippines is not a signatory to the first and signed the second only in 1947. It cannot be denied that the rules and regulations of the Hague and Geneva Conventions form part of and are wholly based on the generally accepted principles of international law. In fact, these rules and principles were accepted by the two belligerent nations, the United States and Japan, who were signatories to the two Conventions. *Such rules and principles, therefore, form part of the law of our nation even if the Philippines was not a signatory to the conventions embodying them, for our Constitution*

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[22] *See* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 84–85 (2001 ed.), *citing United States of America v. Yamashita* (1948) 4 LRTWC 1, pp. 36–7; *In re Yamashita,* 327 US 1 (1945); *Canada v. Meyer,* (1948) 4 LRTWC 98 (Canadian Military Court); Protocol Additional I to the 1949 Geneva Conventions, Article 86(2); Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827, Annex, Article 7(3); Statute of the International Criminal Tribunal for Rwanda,UN Doc. S/RES/955, Annex, Article 6(3); *See also* Christopher Greenwood, *Command Responsibility and the Hadzihasanovic Decision*, 2 J. INT'L. CRIM. JUST. 598, 603–605 (2004).

[23] G.R. No. L–2662, 26 March 1949.

> *has been deliberately general and extensive in its scope* and is not confined to the recognition of rules and principles of international law as contained in treaties to which our government may have been or shall be a signatory [emphasis and italics supplied].

In the strong language of concurring Justice Perfecto in *Yamashita v. Styer*,[24] the absence of any specific statute is not a bar to the prosecution of those committing serious war crimes and crimes against humanity:

> (7) That in violation of the law of nations, the offended party is the people of the whole world, and the case against petitioner could be properly entitled as "Humanity versus Tomoyuki Yamashita," and no person in position to prosecute the violators can honestly shirk the responsibility of relentlessly prosecuting them, *lest he be branded with the stigma of complicity.*
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> (8) That the absence of a codified International Penal Code or of a criminal law adopted by the comity of nations, with specific penalties for specific and well-defined international crimes, is not a bar to the prosecution of war criminals, as all civilized nations have provided in their laws the necessary punishment for war crimes which, for their very nature, cease to be lawful acts of war, and become ordinary crimes with the extraordinary character of having been committed in connection with war, which should be considered as an aggravating circumstance [emphasis and italics supplied].

The Philippine Supreme Court has applied the concept of a superior's "fault or negligence" (and rejected a strict liability

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[24] G.R. No. L-129, 19 December 1945, 75 Phil 563, at 596 (Perfecto, J., concurring and dissenting).

standard to impute liability on superiors) under the doctrine of command responsibility in several cases subsequent to *Yamashita* and *Kuroda*.[25] With the absence of any subsequent cases directly applying the doctrine of command responsibility since *Yamashita* and *Kuroda*, however, the High Court has not had the occasion to articulate any modifications to the content of the doctrine as incorporated in the Philippine legal system. It may therefore be argued, with some plausibility, that the customary status of the doctrine still lies with the conceptual elements traceable to the 1907 Hague Conventions and as affirmed in the jurisprudence of the World War II international military tribunals.

Doctrinal Nuances of Command Responsibility as Derivative Imputed Criminal Liability

The doctrine of command responsibility is an inevitable corollary to the state's primary duty to control the conduct of its armed forces. This same state duty underlies the various constitutional provisions[26] demarcating the role of the armed forces and its subordination to civilian supremacy.

Notwithstanding the constitutional weight accorded to the state's duty to control the conduct of its armed forces, however, the imposition of criminal liability under the command responsibility doctrine has met with some resistance. Contrary to orthodox or traditional formulations in domestic criminal law, a superior's criminal liability under the doctrine of command responsibility is **not** based on his overt acts of participation, inducement, or complicity. Rather, the doctrine of command responsibility is a species of derivative imputed criminal liability—where the superior

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[25] *See Aberca et al. v. Ver et al.*, G.R. No. L-69866, 15 April 1988; *Kapunan Jr. et al. v. De Villa et al.*, G.R. No. 83177, 6 December 1988; *People v. Lucero et al.*, G.R. Nos. 64323-24, 31 May 1991; *See also Reyes et al. v. Rural Bank of San Miguel et al.*, G.R. No. 154499, 27 February 2004; *Quimsing v. Lachica, et al.*, G.R. No. L-14683, 30 May 1961.

[26] 1987 CONST., Article 2, § 3; Article 7, § 18; Article 16, §§ 4–6.

is deemed to bear the "same" degree of criminal "culpability" by failing to prevent and/or punish his/her subordinate's commission of serious international war crimes, crimes against humanity, torture, and egregious human rights violations. The superior's crime is one of omission, but the superior is made to suffer the *same* penalties as if he/she had committed the crime/s with his/her subordinate. To borrow from standard Revised Penal Code phraseology, this is the highest degree of "criminal negligence" or "reckless imprudence" punished with the *same* penalty as actual "commission" of serious international crimes. The rationale for this strict and distinct form of derivative imputed criminal liability is that "had the superior officer exercised his command authority properly, [such] offenses [e.g. international human rights violations, crimes against humanity, grave breaches of the Geneva Conventions, torture, and other serious international crimes] would not have taken place."[27]

The foregoing rationale, however, will not result in an "automatic" or "formulaic" application of the doctrine of command responsibility. As will be subsequently shown, resistance to the application of the doctrine of command responsibility to Philippine jurisdiction rests on threshold nuances (and criticisms) accompanying each of the elements of the doctrine. These nuances stem from a mistaken predisposition to analogize standard precepts of domestic criminal law to the doctrine. As seen from its status as customary international law, however, the doctrine of command responsibility should be seen as a species of derivative criminal liability that is deliberately separate and distinct from the concept of individualized criminal liability. Both spheres of criminal liability, however, can coexist in Philippine jurisdiction.

The command authority relationship between superior and subordinate. In a recent press statement,[28] the Executive Secretary publicly declared that the doctrine of command responsibility is

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[27] Greenwood, *supra* note 24, at 599, 604.

[28] Lira Dalangin-Fernandez. *Command Responsibility Does Not Cover Arroyo–Ermita*, 27 June 2007, available at: <http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=73553>.

"qualified" and does not extend to civilian superiors such as the President.

The foregoing contentions have no basis in customary international law. The customary international law doctrine of command responsibility clearly embraces civilian, as well as military, superiors.[29] The World War II international jurisprudence on the doctrine of command responsibility (as incorporated into Philippine jurisdiction) already contemplated the application of the doctrine to civilian superiors. For example, the Tokyo trial of Koki Hirota (a diplomat and civilian who served as foreign minister) before the International Military Tribunal for the Far East affirmed the doctrine of command responsibility, and held Hirota liable for "criminal negligence" and dereliction of duty by failing to prevent and/or cause the investigation and punishment of wartime atrocities. Likewise, the Nuremberg trial of Hermann Roechling (a German steel industry executive in charge of various production facilities during World War II) also applied the doctrine of command responsibility to convict Roechling for preparing to undertake a war of aggression, undertaking aggressive war, and mistreating workers supplied by the German armed forces and state police.[30]

Ultimately, what is determinative of the existence of command authority between the superior and subordinate is the presence of "hierarchy," or whether the superior has "effective control" over subordinates.[31] *Effective control* is defined as the "material ability to prevent or punish the commission of offenses," and can exist even "without formal authority" so long as the superior has de facto control over the conduct of the subordinates committing serious

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[29] Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 YALE J. INT'L. L. 89, at 104 (2000); *See also* Decision on Motion for Judgment of Acquittal, Milosevic (IT-02-54), 16 June 2004, Trial Chamber, § 143 *et seq*.

[30] *See also* Jared Olanoff, *Holding a Head of State Liable for War Crimes: Command Responsibility and the Milosevic Trial*, 27 SUFFOLK TRANSNAT'L L. REV. 327, at 339–340 (2004).

[31] *See* Kayishema and Ruzindana (ICTR-95-1; ICTR-96-10), Trial Chamber II, 21 May 1999, §§ 208–231.

international crimes.[32] While the existence of effective control is indeed a factual determination that will depend on the circumstances, it should likewise be borne in mind that customary international law has long rejected the immunization or insulation of heads of state and other "official" state actors from criminal responsibility for serious international crimes.[33]

Mens Rea Requirement: the existence of "information" that triggers the superior's affirmative duty to act. The doctrine of command responsibility is not a theory of strict liability. Rather, a superior is criminally liable under the doctrine of command responsibility where he/she has: (a) actual knowledge that his/her subordinates were committing serious international crimes, and despite such knowledge, the superior failed to take steps to prevent the commission of such crimes or punish the subordinates; (b) imputed knowledge of the subordinates' commission of such crimes where he/she is in receipt of information, official or otherwise, about his/her subordinates' acts, but his/her failure to acquaint himself/herself with such information amounts to "willful blindness;" or (c) the superior shows negligence in obtaining knowledge on his/her subordinates' commission of the serious international crimes, under circumstances describing the superior's fault in failing to acquire such knowledge. In any of these three variations of *mens rea,* the superior's affirmative duty to act (to either prevent the commission of offenses or punish the subordinates/perpetrators) is triggered. Failure to fulfill this affirmative duty results in criminally culpable conduct.

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[32] David L. Nersessian, *Whoops! I Committed Genocide: The Anomaly of Constructive Liability for Serious International Crimes*, 30 SUM-FLETCHER F. WORLD AFF. 81, 88–89 (2006); *See* Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L. CRIM. JUST. 159, 179–178 (March 2007).

[33] Harold Hongju Koh, *Can the President Be Torturer in Chief?* 81 IND. L.J. 1145, 1152–1153, 1162–1163 (2006); *See* Judgment of the International Military Tribunal of Nuremberg, 30 September 1946; Eichmann Case, 36 I.L.R. 5, (1961); Ex Parte Pinochet, No. 3 (2000); *See also The Prosecutor v. Dusko Tadic,* Case No. IT-94-1-A (15 July 1999), International Criminal Tribunal for the former Yugoslavia.

Clearly, the *mens rea* of a superior liable under the doctrine of command responsibility is not the same as the *mens rea* of the subordinates who commit serious international crimes. There is no need to prove a common design, intent, or enterprise between the superior and the subordinate to hold both equally liable for the penalty prescribed for serious international crimes. The superior's *mens rea* is ultimately a problem of "foreseeability," or the extent by which the superior "knew or had reason to know" that his/her subordinates committed, or were about to commit, serious international crimes.[34]

The concept of criminal liability for omissions by means of fault or *culpa* (resulting from imprudence, negligence, lack of foresight, or lack of skill) is not alien to Philippine criminal law.[35] The objection to the superior's *mens rea* in the doctrine of command responsibility is the *treatment* of his/her moral depravity as being "constructively equal" to that of the subordinates perpetrating serious international crimes. By traditional Philippine criminal law standards, negligence or recklessness resulting in death (homicide) is penalized with a lesser penalty than the intentional felony of homicide. However, in the customary international law doctrine of command responsibility as incorporated into Philippine jurisdiction, the superior's negligence is basis to hold him/her "equally liable" for his/her subordinates' actual commission of serious international crimes.

Thus, the criticism against the *mens rea* requirement for superiors in the doctrine of command responsibility is not against its existence per se, but rather against its presumed "proportionality" or comparability with the *mens rea* of subordinates actually committing serious international crimes. Admittedly, there is some theoretical basis to hold that negligence is a "weak" basis for criminal liability under the retributive theory of criminal law. Negligence

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[34] *See* Jens David Ohlin, ***Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise***, 5 J. INT'L. CRIM. JUST. 69, 81–85 (March 2007).

[35] REVISED PENAL CODE, Article 3; *See* FLORENZ D. REGALADO, CRIMINAL LAW CONSPECTUS 13–14 (2003 ed.).

has been criminally outlawed as a matter of deterrence, and not in "retribution" for the evil intent of "guilty minds."[36] "Proportionality" disputes, however, should not affect the existence of a superior's criminal liability under the doctrine of command responsibility under customary international law. The question of proportionality is an issue of *lex ferenda*[37] that bypasses the doctrine as *lex lata*, and as incorporated under Philippine jurisdiction. As such, there can be no legal hindrance to the application in Philippine jurisdiction of the *mens rea* requirement, as defined under the customary international law doctrine of command responsibility and incorporated in Philippine jurisdiction.

Actus Reus: Omission by the superior to prevent the subordinates' commission of serious international crimes, or to punish subordinates for such crimes. The doctrine of command responsibility is unique from other types of derivative or imputed criminal liability in international law (such as joint criminal enterprises as defined in the Rome Statute of the International Criminal Court) in that command responsibility only entails an omission, and not any overt act of participation, inducement, or complicity. The doctrine holds the superior criminally liable for his/her failure to act, where he/she had the affirmative duty, and the corresponding ability, to: (a) prevent his/her subordinates from committing future serious international crimes; (b) stop his subordinates from committing such crimes; or (c) punish his/her subordinates for the commission of past crimes.

From the vantage point of Philippine criminal law, there should be little conceptual difficulty with this element of the doctrine of command responsibility. Philippine criminal law also provides for culpable felonies by omission.[38] Under the customary international law doctrine of command responsibility as incorporated into

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[36] O'Reilly, *supra* note 23, at 92–95.

[37] *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1995 ed.)

[38] *See* REVISED PENAL CODE, Article 3; *Calimutan v. People, et al.*, G.R. No. 152133, 9 February 2006.

Philippine jurisdiction, the extent of a superior's omission can be ascertained in relation to his/her relative capability to discharge his affirmative duty to prevent, stop, and punish his/her subordinates for the commission of serious international crimes.

If at all, therefore, the critique against this element of the doctrine is again an issue of proportionality, due to a preference to impose heavier penalties for "committed" felonies rather than felonies by omission. As previously shown, however, this argument on "proportionality" is an irrelevant *lex ferenda* concern more properly directed to Philippine legislators. For purposes of implementing the doctrine of command responsibility as incorporated in Philippine jurisdiction, there should be no legal hindrance to a judicial appraisal of the element of *actus reus* according to the above-described customary international law standards.

Imputed Liability: The *same* penalty for the superior as for the subordinate. The customary international law doctrine of command responsibility, as incorporated in Philippine jurisdiction, imposes the *same* penalty on the superior as that imposed on the subordinate committing serious international crimes. This is perhaps the most contentious element of the doctrine, since traditional criminal law theorists could ground their "proportionality" objections on penal philosophical theories such as self-defense, deterrence, exemplarity, retribution, reformation, or justice.[39]

It would be difficult, however, to ignore the weight of the Supreme Court's categorical affirmation of the doctrine of command responsibility in *Yamashita* and *Kuroda.* Until the content of customary international law can be seen as having modified the scope of punishment imposed on the superior for his/her criminal negligence, the customary international law status of the doctrine of command responsibility remains as described in the jurisprudence of the World War II tribunals. (As will be shown in Part III, there

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[39] FLORENZ D. REGALADO, CRIMINAL LAW CONSPECTUS 124 (2003 ed.); *See* Robert D. Sloane, *The Expressive Capacity for International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 STAN. J. INT'L. L. 39 (2007).

is still considerable debate—militating against the attainment of customary status—of recent refinements to the doctrine of command responsibility from Additional Protocol I to the 1949 Geneva Conventions, the statutes and jurisprudence of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Rome Statute of the International Criminal Court.)

Thus, as seen from the foregoing discussion of the nuances to the elements of the doctrine of command responsibility, there is no legal hindrance to the doctrine's application in Philippine jurisdiction. The proper analytical approach in applying the doctrine of command responsibility is to treat it as a separate and distinct regime for deriving criminal liability of superiors, outside of the traditional schema of individualized criminal responsibility under domestic criminal law. As previously shown, there is no real conflict between the customary norm on command responsibility and Philippine criminal law. (In fact, the elements of the doctrine bear conceptual similarities with Philippine penal concepts.) Philippine criminal law itself is silent, or at best, contains a "void" on the specific *criminal* responsibility of superiors for their subordinates' commission of serious international crimes.[40] Thus, in recognition of the doctrine as a generally accepted principle of international

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[40] *See* Executive Order No. 226 (Institutionalization of the Doctrine of "Command Responsibility" in All Government Offices, Particularly at All Levels of Command in the Philippine National Police and All Law Enforcement Agencies), 17 February 1995, *which provides for administrative liability for command responsibility in the following provisions:*

> Section 1. Neglect of Duty Under the Doctrine of "Command Responsibility."—Any government official or supervisor, or officer of the Philippine National Police or that of any other law enforcement agency shall be held accountable for "Neglect of Duty" under the doctrine of "command responsibility" if he has knowledge that a crime or offense shall be committed, is being committed, or has been committed by his subordinates, or by others within his area of responsibility and, *despite such knowledge, he did not take preventive or corrective action either before, during, or immediately after its commission.*
>
> Section 2. Presumption of Knowledge.—A government official or supervisor, or PNP commander, is presumed to have knowledge of the

law that "forms part of the laws of the land,"[41] it is entirely permissible to deem the doctrine of command responsibility as a separate and distinct regime to derive the criminal liability of superiors.

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commission of irregularities or criminal offenses in any of the following circumstances:

a. *When the irregularities or illegal acts are widespread within his area of jurisdiction*;
b. When the irregularities or illegal acts have been *repeatedly or regularly committed within his area of responsibility*; or
c. When members of his immediate staff or office personnel are involved.

....

Section 4. Administrative Liability.—Any violation of this Executive Order by any government official, supervisor, officer of the PNP and that of any law enforcement agency shall be held administratively accountable for violation of existing laws, rules and regulations [emphasis and italics supplied].

[41] 1987 CONST., Article II, §. 2; *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2003 ed.), especially, Chapter 2 on *The Relation of Municipal and International Law*; *See also Secretary of Justice v. Lantion et al.*, G.R. No. 139465, 18 January 2000, which held that:

> The doctrine of incorporation is applied whenever municipal tribunals (or local courts) are confronted with situations in which there appears to be a conflict between a rule of international law and the provisions of the constitution or statute of the local state. Efforts should first be exerted to harmonize them, so as to give effect to both since it is to be presumed that municipal law was enacted with proper regard for the generally accepted principles of international law in observance of the Incorporation Clause in the above-cited constitutional provision (CRUZ, PHILIPPINE POLITICAL LAW, 1996 ed., p. 55). In a situation, however, where the conflict is irreconcilable and a choice has to be made between a rule of international law and municipal law, jurisprudence dictates that municipal law should be upheld by the municipal courts (*Ichong v. Hernandez*, 101 Phil. 1155 [1957]; *Gonzales v. Hechanova*, 9 SCRA 230 [1963]; In re: Garcia, 2 SCRA 984 [1961]) for the reason that such courts are organs of municipal law and are accordingly bound by it in all circumstances (Salonga & Yap, op. cit., p. 13). The fact that international law has been made part of the law of the land does not pertain to or imply the primacy of international law over national or municipal law in the municipal sphere. The doctrine of incorporation, as applied in most countries, decrees that rules of international law are given equal standing with, but are not superior to, national legislative enactments. Accordingly, the principle *lex posterior derogat priori* takes effect—a

Finally, considering that the customary international law doctrine of command responsibility as incorporated into Philippine jurisdiction will be implemented as a separate and distinct regime for deriving criminal responsibility of superiors, will the legal justification of "obedience to superior orders" in domestic criminal law[42] be applicable to insulate the subordinates committing serious international crimes from criminal liability? If the legal justification is not applicable, could superiors still be held liable for issuing patently illegal (void or legally inexistent) orders?

The classic paradox is explained by one of the established publicists of international laws thus:

> If we examine the well-known doctrines under the laws of war of "command responsibility" and "superior orders is no defense," we find that their combination leads to an unexpected conceptual paradox. Suppose that A, a military commander, issues an order to his subordinate B that is clearly illegal under the laws of war. (For example, the order may be to execute prisoners of war, or to kill civilians in the absence of military necessity.) If B carries out the order, B is criminally liable under the Nuremberg precedents and humanitarian law as the perpetrator of a criminal act. Should B attempt to defend his action on the ground that he was following orders, the tribunal will respond that the order was illegal and hence should not have been obeyed. Now suppose, however, that A is accused of issuing the order that was in fact obeyed and that in fact resulted in the commission of the crime by B. Under the applicable precedents regarding command responsibility, A would be held criminally

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treaty may repeal a statute and a statute may repeal a treaty. In states where the constitution is the highest law of the land, such as the Republic of the Philippines, both statutes and treaties may be invalidated if they are in conflict with the constitution.

[42] REVISED PENAL CODE, Article 11, para. 6.

> liable. But herein lies the paradox: A can contend that the order was concededly illegal, that it should not have been carried out, and the situation is thus equivalent to there having been no order at all. Indeed, A argues, if B was denied the defense of superior orders, because A's order was illegal, then the responsibility for the criminal act was entirely B's. No additional responsibility should be attributed to A."[43]

Consistent with the Nuremberg precedents and other World War II jurisprudence on command responsibility, the paradox is resolved by framing the superior's responsibility not from mere issuance of the order alone, but more so from his/her failure to prevent or stop his/her subordinate from committing the serious international crime:

> If we look at the concept of command responsibility as it has been developed through multilateral conventions and in customary law as recognized by the Nuremberg and Far East tribunals, we find that it contains two necessary elements: (1) that the commander knew or should have known of the commission of the war crime, and (2) that he was capable of inhibiting or preventing it. Under these rules, let us again suppose that A issues an order to B to commit a war crime. The order itself, as we have seen, is illegal and hence invalid. But it nevertheless has evidentiary value under the first of the two elements of command responsibility: the fact that he gave the order means that A knew or should have known of the commission of the war crime.
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> However, A's order does not prove the second of the two elements of command responsibility—that A was capable of preventing or inhibiting the commission

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[43] Anthony D'Amato, *Superior Orders vs. Command Responsibility*, 80 AM. J. INT'L. L. 604 (1986).

> of the war crime. Does the fact of the order estop A to defend on the ground of incapability? The answer must be negative, because capability is a function of the military command structure and the military context, factors that are not necessarily within A's control. The question, in short, is whether A wanted or did not want B to commit the war crime, but whether A could have stopped or hindered B from doing so. The prosecutor's burden of proof on this latter issue is not discharged by simply introducing A's order into evidence; *rather facts must be adduced about A's actual power to affect B's actions.*
>
> The initial paradox is thus resolved. The doctrines of "command responsibility" and "no defense of superior orders" are not incompatible with the results of actual cases, and they are not mutually inconsistent. But the liability of the military commander cannot be predicated upon his order alone, for what this analysis has shown is that the element of capability of controlling subordinates must be proven independently.[44]

It is submitted that the legal justification of "superior orders" under the Revised Penal Code cannot insulate subordinates-perpetrators from criminal liability. In the first place, the legal justification presumes a valid or lawful order. The execution of orders that are facially unlawful, however, cannot be legally justified.[45] More importantly, the customary international law status on command responsibility (as seen from the jurisprudence of the World War II tribunals) itself shows a consistent rejection of the defense of superior orders. Both domestic criminal law and customary international law harmoniously reject the defense of superior orders for patently illegal orders involving the commission of serious international crimes and crimes against humanity.

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[44] *Id.*, at 607–608 [emphasis supplied].

[45] *See Ramos v. Sandiganbayan et al.*, G.R. No. 58876, 27 November 1990.

With the denial of the defense of superior orders, however, criminal liability for serious international crimes is not absorbed solely by the subordinates-perpetrators. Precisely because the customary international legal doctrine of command responsibility as incorporated in the Philippines requires treatment as a separate and distinct regime for deriving criminal liability of superiors in the Philippines, the (deliberate or inadvertent) architects of serious international crimes cannot escape criminal responsibility. Insofar as the present content of the customary international law doctrine of command responsibility is concerned, the superior who fails and/or neglects to supervise and control the conduct of his/her subordinates (in order to prevent, stop, or punish the commission of serious international crimes) is criminally culpable to the same degree as the subordinates who committed such crimes. The justification for this parallel imposition of liability on the superior stands under the customary norm: these serious international crimes "would not otherwise have been committed" had the superior exercised the highest vigilance during his/her watch.

Emerging Refinements to the Doctrine of Command Responsibility: Post World War II Developments

The doctrine of command responsibility has undergone various refinements since World War II. The customary status of these "refinements," given the divergence of state practice and *opinion juris*, is still the subject of considerable debate.[46] As such, while there is no legal hindrance to applying the doctrine of command responsibility under its present customary status within Philippine jurisdiction, the ongoing "refinements" to the doctrine cannot be deemed incorporated into the Philippine legal system. The following synthesis of current "refinements" is based on international instruments where the Philippines is not (or yet) a party. They may

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[46] *See* Fergal Gaynor and Barbara Goy, *Current Developments at the Ad Hoc International Criminal Tribunals*, 5 J. INT'L CRIM. JUST. 544 (May 2007).

be of interest to the Philippine Legislature, should it prefer to depart from the current status of the customary international law norm of the doctrine (based on World War II jurisprudence and the 1907 Hague Conventions as articulated in *Yamashita* and *Kuroda*) in order to enact legislation specifically adopting these emergent standards.

Articles 86 to 87 of Additional Protocol I to the 1949 Geneva Conventions (AP I)

The Philippines has not yet signed the AP I. Article 86 of AP I provides liability in case of "failure to act." In this case, a superior is liable where: 1) he/she fails to repress grave breaches of the Geneva Conventions or to take necessary measures to suppress all other breaches of the Conventions; and 2) the superior knew, or had information which should have enabled him/her to conclude that the subordinate was committing, or was going to commit, such a breach. On the other hand, Article 87 of AP I explicitly specifies the duty of commanders with respect to "forces under their command," *and* "other persons under their control." Such commanders are required to: 1) prevent, suppress, and report to competent authorities breaches of the Geneva Conventions and AP I; 2) commensurate with their level of responsibility, ensure that their subordinates are aware of their obligations under the Conventions and AP I; 3) if the superior is aware that a breach of the Conventions is or will be committed, he/she must initiate steps to prevent violations and initiate disciplinary or penal action against the subordinate. Finally, under AP I, the prescribed punishment for the superior is *not* the same as for the actual commission of war crimes by the subordinate.[47]

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[47] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, *entered into force* 7 December 1978, Articles 86 and 87.

Statute and Jurisprudence of the International Criminal Tribunal of the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)

Article 7(3) of the ICTY Statute formulates the doctrine of command responsibility, thus:

> The fact that any of the acts referred to in Articles 2 to 5 of the present Statute [Grave Breaches of the Geneva Conventions of 1949 and Crimes Against Humanity] was committed by a subordinate does not relieve his superior of criminal responsibility *if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof*[48] [emphasis and italics supplied].

The foregoing phraseology is virtually identical to article 6(3) of the ICTR Statute:

> The fact that any of the acts referred to in Articles 2 to 4 of the present Statute [Genocide and Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II] was committed by a subordinate does not relieve his or her superior of criminal responsibility *if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof*[49] [emphasis and italics supplied].

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[48] Statute of the International Tribunal, adopted by S.C. Res. 827, UN SCOR, 48th Sess., 3217th mtg. at 6, UN Doc. S/RES/827 (1993), Article 7(3), 32 I.L.M. 1203 (1993).

[49] Statute of the International Criminal Tribunal for Rwanda, (as amended in 1998, 2000, 2002, and 2003) UN Doc. S/RES/955 (1994); Article 6(3)33 ILM 1598.

Under both statutes of the ICTY and the ICTR, the *mens rea* requirement is either: (1) actual knowledge; or (2) imputed knowledge ("had reason to know") that the subordinate was about to commit such acts or had done so. In the *Celebici* judgment,[50] the ICTY held that a superior's duty to act would only be triggered if he/she had "specific information available to him/her" which would "put him/her on notice" about the conduct of his/her subordinates. On the other hand, in the *Akayesu* judgment,[51] the ICTR held that a superior had the duty "to obtain information about the conduct of his/her subordinates," and the ensuing duty to act on such information.

Both the jurisprudence of the ICTY and the ICTR commonly hold that the *actus reus* is the superior's omission or failure to take necessary and reasonable measures to: (1) prevent such acts; or (2) punish the perpetrators. In ascertaining whether or not a superior has done everything feasible to prevent or suppress war crimes, the tribunal may consider the existence of a "causal nexus" between the superior's failure to take measures and his/her subordinates' commission of the serious international crimes.[52]

Rome Statute of the International Criminal Court (ICC)

To date, the Philippines has still not ratified the ICC Statute. Article 28 of the ICC Statute contains the latest international developments on the doctrine of command responsibility:

> Article 28. Responsibilities of Commanders and Other Superiors.
>
> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:"

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[50] *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Judgement (16 November 1998); *Prosecutor v. Delalic*, Case No. IT-96-21-A, para. 195 Celibici, Appeals Judgement (20 February 2001).

[51] *Prosecutor v. Akayesu*, Case No. ICTR-96-4-I Judgement (2 September 1998).

[52] Hansen, *supra* note 8, at 379–384.

(a) A military commander or person effectively acting as a military commander *shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces* under his/her effective command and control, or effective authority and control as the case may be, as a result of his/her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
(ii) That military commander or person failed to take all necessary and reasonable measures within his/her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), *a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates* under his/her effective authority and control, as a result of his/her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
(iii) The superior failed to take all necessary and reasonable measures within his/her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 28 contemplates both civilian and military superiors, takes into account the possibility of *de facto* commanders and other non-traditional superior-subordinate relationships. The crux of the command-authority relationship is the existence of either "effective command and control" or "effective authority or control" over the subordinate. The *mens rea* requirement is either: (a) actual knowledge; (b) imputed knowledge ("should have known" based on the circumstances); or (c) constructive knowledge ("consciously disregarded information which clearly indicated that subordinates were committing or about to commit crimes"). The *actus reus* consists of the omission or failure to take all necessary and reasonable measures within the superior's power to: (a) prevent or repress the commission of the crimes; or (b) submit the matter to competent authorities for investigation and prosecution.

It should be noted, however, that Article 28 of the ICC Statute explicitly holds superiors "criminally responsible" for the serious international crimes committed by their subordinates. This augurs the imposition of *similar* (if not identical) punishment upon both the superior and the subordinate. However, this theoretical construct has its share of detractors. It should likewise be borne in mind that most municipal or national legal systems throughout the world require that "perpetration be sharply differentiated from complicity" in terms of the severity of punishment, and that it is largely the Anglo-American and French criminal legal traditions that embrace an indiscriminate approach to penalizing culpable and felonious conduct.[53]

Joint Criminal Enterprises (JCE) under ICTY Jurisprudence

The ICTY drew from Nuremberg conspiracy law to devise the concept of "joint criminal enterprises" (JCE). The first expression of JCE doctrine is found in the appeals judgement in *Tadic*,[54] differentiated between three types of collective criminality: (1) one based on the shared intent of the superior and the subordinate, as

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[53] Damaska, *supra* note 23, at 459.

[54] *Prosecutor v. Tadic*, Case No. IT-94-1), Appeals Chamber Judgement, § 185 *et seq.* (15 July 1999).

seen from their common design, common intention, or common enterprise; (2) a "systemic" form of the enterprise, seen from cases involving concentration camps, showing a common plan and unity of purpose between the superior and the subordinate, and where the superior bears personal knowledge of the engineered system of ill treatment; and (3) "extended" joint enterprise where a co-perpetrator acts *beyond* the common plan, but his/her acts are a natural and foreseeable consequence of the realization of the plan. (In this third type of collective criminality, all participants, whether superior or subordinate, participate in the criminal purpose and act to further this purpose. All participants contribute to the commission of the crime.)[55] JCE doctrine can therefore establish the direct responsibility of political and military leaders for "policy" crimes executed by their rank and file subordinates based on an explicit agreement or common design, as well as criminal responsibility for the *foreseeable consequences* of the common design.[56]

JCE doctrine conceptually differs from the doctrine of command responsibility by requiring a higher threshold of *actual positive overt acts* through any "form of assistance in, or contribution to, the execution of the common purpose" to commit the acts comprising serious international crimes. Command responsibility, on the other hand, is engaged simply from an *actus reus* of omission.

JCE doctrine is not traceable to any particular provision of the ICTY statute, but from jurisprudence of the ICTY since *Tadic*. It is still in its nascent stages of development. It is fundamentally a theory for conspiracy and complicity, and not criminal negligence as contemplated in the doctrine of command responsibility. The third form of JCE ("extended" joint enterprise) bears similarities to the doctrine of command responsibility by providing a form of "vicarious" liability for the acts of subordinates. However,

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[55] Ambos, *supra* note 34, at 160–161; *See* Harmen Van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations*, 5 J. INT'L. CRIM. JUST. 91 (2007).

[56] *Prosecutor v. Krstic*, Case No. T-98-33-T, Judgement, § 615 *et seq.* (2 August 2001).

considering its almost exclusive pattern of development from the ICTY jurisprudence (supposedly traceable to Nuremberg and Tokyo trial precedents), JCE doctrine remains one of the most complex and highly challenged theories of liability in international criminal law.[57]

The Doctrine of Command Responsibility: Criminal Liability of Civilian and Military Superiors for Extrajudicial Killings in the Philippines

The Melo Commission Report concluded that "responsibility for the [extrajudicial] killings is limited to individual officers and requires further proof of a wrongful act or omission."[58] The Report, however, makes the following specific findings:

> 21. Summary/Notable Matters
>
> a. The AFP did not conduct any formal investigation of suspects, but admits a rise in reported killings.
> b. General Esperon is convinced that the recent activist and journalist killings were carried out by the CPP-NPA as part of a "purge." Captured documents supposedly prove this. The full contents or a copy of the documents, however, were not presented to the Commission.
> c. Likewise, General Esperon was firm in his position that the victims were members of the CPP-NPA and that the activist organizations, while legal, are infiltrated by the CPP-NPA. He stated that these organizations are being manipulated by the NPA.

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[57] Jacob A. Ramer, *Hate by Association: Joint Criminal Enterprise Liability for Persecution*, 7 CHI-KENT J. INT'L. & COMP. L. 31, at 37–61 (2007).

[58] MELO COMMISSION, *supra* note 3, at 67.

d. General Esperon admitted receiving reports about Palparan being suspected of conducting extrajudicial killings, being called *Berdugo,* etc. but he attributed this to propaganda of CPP-NPA.
e. General Esperon admitted that no formal investigation was conducted by the AFP on General Palparan, simply because no complaint was filed. He mentioned that he merely called General Palparan on his cell phone and did not go beyond the latter's denials.[59]

With respect to the widespread incidence of extrajudicial killings in the areas of responsibility formerly under (retired) General Jovito S. Palparan, the Commission held that no evidence was shown that General Palparan was "called upon to account for and to explain the same by his superiors," despite the fact that his "public statements alone could have provoked disciplinary action against him, not to mention court martial, for violation of the Articles of War."[60]

The Commission expressly declared that "under the doctrine of command responsibility, it was not proper to contend that no action under the circumstances was taken because no complaint had been lodged against General Palparan and/or that anyway, Task Force USIG could very well have called him to account for his actions and words." However, the Commission noted that the President "recognized the need for official state action to address what she felt was a disturbing rise in the number of killings of media men and activists," thus creating "Task Force USIG to prioritize the investigation of the killings."[61] The Commission did *not* recommend the criminal prosecution of any specific superior, military or otherwise, under the doctrine of command responsibility, other than to generally call for the creation of independent agencies to handle the investigation and prosecute the perpetrators of

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[59] MELO COMMISSION, *supra* note 3, at 19.
[60] *Id.* (fn. 60).
[61] MELO COMMISSION, *supra* note 3, at 67 (fn. 60).

extrajudicial killings. Thereafter, recent news reports disclosed that three generals had information that the extrajudicial killings of activists were discussed in military command conferences.[62]

The Executive Secretary has publicly theorized that command responsibility "applies only to military personnel and not the President as Commander-in-Chief:"

> In February, the Armed Forces of the Philippines (AFP) came up with a memorandum on military personnel's "strict adherence to the doctrine of command responsibility."
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> Reading the document, Ermita said that "there is such a thing as level of application."
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> "From what I understand...it applies to the next higher [officials, usually] two ranks higher. For example, if you're a company commander, it could apply to the battalion commander and the brigade commander. It depends on the findings of the immediate commander with their respective generals," he said.
>
> Under the section "neglect of duty under the doctrine of command responsibility," the document said that "any AFP officer shall be held accountable for neglect of duty under the doctrine of command responsibility if he has knowledge that crime or offense shall be committed, is being committed, or has been committed by his subordinates, or by others within his area of responsibility and, despite such knowledge, he did not take preventive or corrective action either before, during, or immediately after its commission.[63]

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[62] Joel Guinto and Maila Ager. *AFP dares generals to come open on killings: Left dares Arroyo to sack, probe killings*, in *Philippine Daily Inquirer*, 25 June 2007, available at: <http://newsinfo.inquirer.net/breakingnews/nation/view_article.php?article_id=7317>. (Last visited 1 July 2007).

[63] MELO COMMISSION, *supra* note 3, at 67 (fn. 30).

Clearly, the Executive Secretary's theory (based on perceived norms of military justice) is completely incongruous to the customary international legal doctrine of command responsibility, long incorporated under Philippine jurisdiction. There is basis in the Philippine legal system (which adopts the doctrine of command responsibility as part of the laws of the land) to assign criminal responsibility to military superiors such as General Palparan, and civilian superiors such as the President, under the doctrine of command responsibility. The essence of the doctrine is "criminal negligence" of the highest degree, manifest from a superior's failure or omission to supervise the conduct of his/her subordinates to *prevent, stop,* and *punish* the commission of serious international crimes.

As previously shown, criminal liability under the doctrine of command responsibility is a separate legal regime that should be treated distinctly from domestic penal law concepts of participation, complicity, and inducement. The customary international legal doctrine of command responsibility therefore cannot be seen as a mere auxiliary of military justice.[64] Throughout its genesis in international law and up to its incorporation into the Philippine legal system, the doctrine of command responsibility operates *sui generis* to crystallize global rejection of impunity, and thus recognize strict collective responsibility where serious international crimes, egregious violations of human rights, and crimes against humanity are involved. It is the "need for justice, the grievousness of the *jus cogens* violations, and the evidentiary burden particular to superiors, [that] has driven the doctrine of superior responsibility."[65] Most importantly, the doctrine of command responsibility is humanity's necessary tool to deter serious international crimes by deliberately dis-

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[64] *See* James W. Smith III, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 61 (2006).

[65] Avi Singh, *Criminal Responsibility for Non-State Civilian Superiors Lacking De Jure Authority: A Comparative Review of the Doctrine of Superior Responsibility and Parallel Doctrines in National Criminal Laws*, 28 HASTINGS INT'L. & COMP. L. REV. 267, at 284–285 (2005).

incentivizing a superior's culpable negligence and omission to supervise, control, prevent, and punish the felonious conduct of his/her subordinates. The doctrine should not lose its potency due to (deliberate or involuntary) misapprehension and confusion with domestic penal law concepts.

The findings in the Melo Commission Report should therefore suffice to initiate criminal prosecution against superiors such as General Palparan. No legislation is necessary since criminal liability under the doctrine of command responsibility (as a norm of customary international law explicitly recognized by the Supreme Court in *Yamashita* and *Kuroda*) has the status of law in the Philippines.[66]

Applying the four elements of the doctrine of command responsibility as incorporated under Philippine jurisdiction (and subject to further factual supplementation and verification), there is basis to impute criminal liability to General Palparan. First, it is undeniable that there is a clear command authority relationship between him and the subordinates accused of perpetrating the extrajudicial killings and enforced disappearances of activists and media personnel. Second, as seen from his own public statements to the media which were enumerated under the Melo Commission Report,[67] General Palparan clearly had information of the prevalence of the extrajudicial killings and their attributability to his subordinates, which triggered his affirmative duty to act to prevent, stop, investigate, and punish the commission of such crimes, but General Palparan refused to fulfill this duty, and even offered words of encouragement to those responsible. As precisely found by the Commission:

> General Palparan's numerous public statements caught on film or relayed through print media give the overall impression that he is not a bit disturbed by the

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[66] *See Mijares et al. v. Ranada et al.*, G.R. No. 139325, 12 April 2005; *Minucher v. Court of Appeals et al.*, G.R. No. 142396, 11 February 2003.

[67] MELO COMMISSION, *supra* note 3, at 53–57.

extrajudicial killings of civilian activists, whom he considers enemies of the state. He admits having uttered statements that may have encouraged the said killings. He also obviously condones these killings, by failing to properly investigate the possibility that his men may have been behind them.

General Palparan's statements and cavalier attitude towards the killings inevitably reveals that he has no qualms about the killing of those whom he considers his enemies, whether by his order or done by his men independently. He mentions that if his men kill civilians suspected of NPA connection, "it is their call," obviously meaning that it is up to them to do so. This gives the impression that he may not order the killings, but neither will he order his men to desist from doing so. Under the doctrine of command responsibility, General Palparan admitted his guilt of the said crimes when he made his statement. Worse, he admittedly offers encouragement and "inspiration" to those who may have been responsible for the killings.

He also admits to having helped in the creation of so-called "barangay defense forces," which may or may not be armed, to prevent the entry of CPP-NPA in such barangays. Such defense forces are equivalent to an unofficial civilian militia. It is well known that such militia can easily degenerate into a mindless armed mob, where the majority simply lord it over the minority. This is a fertile situation for extrajudicial killings. In this way, General Palparan contributed to the extrajudicial killings by creating ideal situations for their commission and by indirectly encouraging them[68] [emphasis supplied].

The third element of the doctrine of command responsibility (*actus reus*, or the superior's omission or failure to fulfill his/her

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[68] MELO COMMISSION, *supra* note 3, at 56.

affirmative duty to prevent, stop, investigate, and punish his/her subordinates' commission of serious international crimes, egregious violations of human rights, torture, and crimes against humanity) is likewise satisfied from the foregoing findings of the Commission. Significantly, the Commission itself found the presence of a causal nexus between General Palparan's omission and his subordinates' commission of the extrajudicial killings when it held that General Palparan "contributed to the extrajudicial killings by creating ideal situations for their commission and by indirectly encouraging them." Thus, the fourth element of the doctrine necessarily applies, such that General Palparan should be criminally liable and punished with the same penalty as that prescribed for the serious international crimes, torture, crimes against humanity, and egregious human rights violations committed by his subordinates.

The assignment of criminal liability need not be restricted to General Palparan. Where factual findings likewise satisfy the four elements of the doctrine of command responsibility under customary international law as incorporated into Philippine jurisdiction, other military superiors in the Armed Forces of the Philippines can likewise be criminally prosecuted by Philippine prosecutors and held criminally liable by Philippine courts. Due to the presence of customary legal doctrine of command responsibility in the Philippine legal system, the attribution of responsibility need not be confined within the auspices of the military justice system (or even restricted to mere administrative liability). There being no legal impediment to the use of the doctrine of command responsibility as a basis for deriving criminal liability in Philippine jurisdiction, prosecutors should not hesitate to draw up and file the corresponding information against superiors under the four definitive elements of the doctrine of command responsibility. In turn, courts should not be reluctant to issue convictions where the evidence presented supports all four elements of the doctrine of command responsibility.

Finally, can civilian superiors such as the President, as commander-in-chief of the Armed Forces of the Philippines,[69] be

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[69] 1987 CONST., Article 7, § 18.

held criminally liable under the customary international law doctrine of command responsibility as incorporated in Philippine jurisdiction?

Bypassing the issue of the President's *suability* during her term, it is submitted that, subject to factual verification and submission of evidence, there should be no hindrance to imputing criminal liability later to a (non-sitting former) head of state such as the President under the customary international law doctrine of command responsibility.[70] The customary status of the doctrine admits of application to *civilian* superiors such as former heads of state.[71] This is fully consistent with the underlying rationale for the international criminal legal system, which rejects impunity in whatever form for perpetrators of crimes against humanity and egregious human rights violations.[72]

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[70] *See Estrada v. Desierto, et al.*, G.R. Nos. 146710–15 and 146738, 2 March 2000; *Romualdez v. Sandiganbayan et al.*, G.R. No. 152259, 29 July 2004.

[71] Vetter, *supra* note 31, at 94 says:

> Command responsibility cases decided in the wake of World War II as well as recent events demonstrate that civilian superiors can be intimately associated with violations of human rights law. Civilian superiors should be held no less accountable than military commanders for their involvement with, complicity in, or lack of diligence contributing to these crimes, as long as civilian accountability does not extend beyond an objectively justifiable capability to control subordinates, know of atrocities, and take action to stop them or punish the subordinate offenders.

[72] *See* the Universal Declaration of Human Rights (UDHR) G.A. Res. 217A (III), UN Doc. A/810 Article 8, (1948); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), Article 2(3) 999 UNTS 171; American Convention, O.A.S. Treaty Series No. 36, (1982) Articles 1.1, 2, & 7, 1144 UNTS 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 13, 213 UNTS 222, *entered into force* 3 September 1953, *as amended by* Protocols Nos. 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively;* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, Dordrecht, Martinus Nijhoff Publishers, 1992, p. 224; C.C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENVER J. INT'L. L. & POL'Y 591, at 613; M. Cherif Bassiouni, *Crimes Against Humanity: The Need for A Specialized Convention*, 31 COLUM. J. TRANSNAT'L. L. 457, at 463 (1994).

In the case of the President, a preliminary finding (and subject to additional factual verification and supplementation) of the existence of the four elements of the doctrine of command responsibility can be made:

> *First,* there is a clear command authority relationship between the President and her subordinates in the armed forces. The Constitution vests upon the President as commander-in-chief of the Armed Forces of the Philippines, "absolute authority over the persons and actions of the members of the armed forces," which authority "includes the ability of the President to restrict the travel, movement and speech of military officers, activities which may otherwise be sanctioned under civilian law."[73] Applying the test of "effective control," it is clear that the President's command authority exists in relation to the subordinates-perpetrators. Given her vast constitutional powers, the President clearly has both the material ability to "prevent and punish the commission" of serious international crimes by her subordinates.
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> *Second, b*ased on official government reports, international reportage by global and regional human rights institutions, and widespread regular reporting of the local media, the President has long had information[74] of the prevalence of extrajudicial killings and their attributability to members of her armed forces. Clearly, the President's affirmative duty to prevent, stop, investigate, and punish the commission of extrajudicial killings had long been triggered.
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> *Third,* other than the relatively recent creation of Task Force USIG and the Melo Commission, the President has not taken necessary, concrete, and reasonable measures to prevent,

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[73] *Gudani et al. v. Senga et al.*, G.R. No. 170165, 15 August 2006.

[74] *See* Report of Special Rapporteur, Philip Alston, "Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Extrajudicial, Summary, or Arbitrary Executions," E/CN.4/2005/7 (22 December 2004) United Nations Economic and Social Council. Found at: <http://www.extrajudicialexecutions.org/reports/E_CN_4_2005_7.pdf> (Last visited 1 July 2007).

stop, investigate, and punish the commission of extrajudicial killings and enforced disappearances. Since the earliest reportage of incidents of extrajudicial killings and enforced disappearances up to the present date, there is no showing that the President has initiated any military investigation or criminal prosecution against General Palparan and other military persons identified in the Melo Commission Report. Analogizing from the Melo Commission Report findings on General Palparan, it may likewise be said that the President contributed to the incidence of extrajudicial killings and enforced disappearances by creating "ideal situations for their commission" due to her glaring omission: (1) to maintain the continuous and efficient operation of the command oversight system under the armed forces; and (2) to investigate and cause the prosecution of subordinates-perpetrators of the extrajudicial killings and enforced disappearances, which constitute serious international crimes, torture, crimes against humanity, and egregious human rights violations.

Of course, the causal nexus between the President's omissions and her subordinates' commission of such crimes is a matter of evidence and proof that will determine the extent of the President's *actus reus*. But for purposes of applying the customary international legal doctrine of command responsibility, there is arguably some preliminary basis to impute criminal liability for the President's "criminal negligence of the highest degree."

Fourth, should all of the foregoing elements be fully substantiated, under the present content of the customary international legal doctrine of command responsibility, the President can be held *equally* liable for the *same* punishment prescribed for her subordinates that perpetrated such serious international crimes, torture, crimes against humanity, and other egregious human rights violations.

The foregoing analysis illustrates how the doctrine of command responsibility can be applied in Philippine criminal jurisdiction as a separate and distinct schema for deriving the criminal responsibility

of military and civilian superiors. In the particular context of proliferating extrajudicial killings and enforced disappearances in the Philippines, there should be no legal hindrance to criminal prosecution of both the subordinate-perpetrator and the negligent superior. Under the customary international legal doctrine of command responsibility long incorporated into the Philippine legal system, the legal platform and conceptual tools for allocating criminal responsibility to both superiors and subordinates have long been available. What is urgently needed now is the political will, civilian courage, and judicial independence to fully harness these tools—and arrest both the perception and reality of the Philippines' growing culture of impunity for serious international crimes, torture, crimes against humanity, and other egregious human rights violation.

Conclusion

As seen in the present controversy on the doctrine of command responsibility, doctrinal confusion can engender deplorable inaction and foment impunity for serious international crimes. There is no rhyme or reason why civilian and military superiors in the Philippines should be insulated or immunized from criminal liability for their glaring omissions and failure to prevent, stop, investigate, and punish serious international crimes. Accountability should not be stonewalled by a mere mirage.

Apart from shoring up the obvious fiction of the absence of "effective remedies" for victims of the extrajudicial killings, enforced disappearances, and other egregious human rights violations and crimes against humanity, the Philippine government's long-standing failure to utilize the doctrine of command responsibility constitutes separate breaches of several international obligations.[75] These obligations include, among others: (1) the duty to prosecute persons

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[75] *See* Jan Arno Hessbruege, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U.J. INT'L. L. & POL. 265 (2004).

committing serious international crimes and crimes against humanity;[76] (2) the duty to ensure that there is no "denial of justice" to persons residing or sojourning in Philippine territory, due to "bad faith, the willful neglect of duty, or an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency"[77] and (3) the duty to protect the fundamental human right of all persons to an effective remedy.[78]

It is with some irony that it is the judiciary, and not the executive branch of the Philippine government (which is headed by the ultimate "civilian" superior in the person of the President), that has taken the direct initiative to address issues of responsibility and criminal liability for extrajudicial killings and enforced disappearances through concrete proposals to revise the present legal framework. These proposals, however, need not require the reinvention of the wheel. As previously discussed, the Philippine legal system has long incorporated the customary international legal doctrine of command responsibility, under four distinct elements: (1) the existence of command authority and responsibility between the superior and the subordinate; (2) the *mens rea,* or the existence of information triggering an affirmative duty on the part of the commander; (3) the *actus reus,* or the superior's omissions, failure

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[76] D. F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2357 (1991).

[77] JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 68–69 (2006 ed.).

[78] Article 8 of the Universal Declaration of Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Article 6 of the Convention on the Elimination of Racial Discrimination; Article 2(c) of the Convention on the Elimination of All Forms of Discrimination Against Women; Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment; Article 16 of the Convention on the Rights of the Child; Article 11(3) of the American Convention on Human Rights; Article 8 of the European Convention on Human Rights; Article 5 of the African Charter on Human and Peoples Rights; Articles 16(4) and 16(5) of the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO No. 69, 27 June 1989, 28 I.L.M. 1382.

of supervision, or foreseeable negligence and their causal nexus with the subordinate's crime; and (4) the imputation to the superior of the same criminal liability and punishment for which the subordinate is liable.

Thus, for purposes of initiating criminal prosecution *now* in the context of the ongoing extrajudicial killings and enforced disappearances, the Philippine legal system already contains the legal standards to prosecute and convict both subordinates-perpetrators and superiors. It is for the victims, the prosecutors, and the judges to fully apply this historic doctrine—which, uniquely, traces its origins to the Philippines.

Nevertheless, recent refinements to the doctrine of command responsibility (as enumerated in this analysis) still do not bear the status of customary international law. As such, they cannot be deemed incorporated into the Philippine legal system until their crystallization as custom. It is for the Philippine Legislature to determine whether these refinements (on *mens rea*, *actus reus*, prescribed punishment, and even the concept of joint criminal enterprises) should be specifically adopted into law.

With the continuous rise of extrajudicial killings, enforced disappearances, and other glaring state-sanctioned or state-condoned violations of fundamental human rights, there is particular urgency in this case to "begin action" by "speaking of the unspeakable."[79] Confusion about the scope and demarcations of the doctrine of command responsibility should not silence victims of serious international crimes, torture, crimes against humanity, and egregious human rights violations. Neither should confusion serve as the refuge of subordinates-perpetrators and superiors-architects of these crimes.

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[79] *Id.*, at note 1.